COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of MCI WorldCom, Inc., Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic Massachusetts	)))	D.T.E. 97-116

Complaint of Global NAPS, Inc., Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic Massachusetts	)))	D.T.E. 99-39

RESPONSE OF WORLDCOM, INC., IN OPPOSITION
TO VERIZON MASSACHUSETTS' MOTION TO RE-OPEN DOCKETS

INTRODUCTION

WorldCom, Inc. ("WorldCom"), respectfully submits this response in opposition to the motion filed by Verizon Massachusetts ("Verizon") to reopen dockets 97-116 and 99-39.[1] Now that a federal magistrate judge has recommended a decision adverse to Verizon in the federal court action reviewing the Department's May 1999, July 2000, and August 2001 orders in these dockets,[2] Verizon requests that the Department reopen these dockets "for the limited purpose of taking comments on whether the language contained in particular [interconnection] agreements provides for reciprocal compensation for Internet-bound traffic." (Vz. Mot. at 1.)

The Department should deny Verizon's motion, for two principal reasons:

[1]RCN BecoCom, LLC, also joins in this response.

[2]*Global NAPs, Inc. v. New England Tel.*, Nos. 2000CV10407-RCL et al. (Mag. Findings & Recs. July 5, 2002) (Attached as Ex. A).

First, there is no legal basis to reopen these dockets while actions are pending in the reviewing courts—and nearly complete—concerning the very issues that Verizon would have the Department address. Verizon's motion is an unlawful effort to circumvent the jurisdiction of the federal court (and the state court) reviewing the legality of the Department's prior orders. The Department and Verizon steadfastly have maintained in court that the Department's prior orders were correct, performed the requisite contract analysis, and did not violate federal law. To WorldCom's knowledge, and contrary to the implications of Verizon's motion, neither the Department nor Verizon is confessing error to the court. The courts will resolve whether the Department's orders were lawful. Further, as a matter of comity the Department should await the district court's decision.

Second, it would be unlawful to reopen proceedings for the limited purpose of taking comments on whether the terms of the parties' interconnection agreements require reciprocal compensation for calls to Internet service providers. The Department cannot conduct truncated proceedings to attempt to patch a perceived defect in an order under judicial review.

ARGUMENT

I. The Department May Not and Should Not Reopen These Dockets at this Juncture.

The Department is foreclosed from reopening these proceedings at this juncture. Verizon's motion is an unlawful effort to end-run the jurisdiction of the courts reviewing the Department's prior orders. The parties' disputes concerning the Department's final orders are properly before the federal court under

28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6), and parallel proceedings for judicial review are pending in Massachusetts court under M.G.L. c. 25 § 5.[3]

Verizon has not identified—and cannot identify—any rule of law that supplies authority for the Department to reopen these proceedings long after issuance of the Department's orders and while actions for judicial review are nearly complete. Neither Massachusetts law, federal law, nor the Department's regulations permit it to grant Verizon's request. The Department's regulations simply provide a period of 20 days for reconsideration of a final Department order and 20 days to appeal a final order to the reviewing court. 220 CMR § 1.11(10). Filing of any appeal then must comport with the requirements of M.G.L. c. 25 § 5, which unquestionably vests jurisdiction in the reviewing court. Likewise, as the Supreme Court of the United States has confirmed, federal law vests the district court with jurisdiction to review the Department's prior final orders for compliance with federal law. *Verizon Maryland Inc. v. Public Serv. Comm'n*, 122 S. Ct. 1753, 1758-59 (2002).

To be sure, the Department's regulations permit it to reopen previously closed "hearings" upon a motion by a party "showing . . . good cause." 220 CMR § 1.11(8). But this regulation for reopening "hearings" makes no mention of reopening proceedings *after* final decisions have been issued and decisions on review are imminent, nor does it grant the Department perpetual authority to reopen *dockets* long after issuance of final decisions. The regulation even expressly limits the Department's right to reopen "hearings" on its own motion to the period "*prior* to the rendering of a decision." *Id.* (emphasis added). Massachusetts courts have warned agencies not to abuse their limited authority to reopen

[3]The state court matters were filed because of jurisdictional uncertainties and have been stayed pending the federal court actions.

proceedings. Where regulations do not clearly specify agency authority to reopen adjudications, the agency can only do so "sparingly," and only "on account of *procedural defect* such as fraud, misrepresentation, misconduct, or additional evidence." *Cronin v. Commissioner of Division of Medical Assistance*, No. CV 992853H, 2000 WL 1299483, at *3 (Mass. Sup. Ct. Apr. 24, 2000) (emphasis in original) (attached as Ex. B). Further, applications to reopen proceedings "can hardly be entertained without limit of time," but must be brought within a "reasonable time." *Covell v. Dep't of Social Servs.*, 677 N.E.2d 1158, 1162 (Mass. App. Ct. 1997) (citations omitted); *see also Malone v. Civil Service Comm'n*, 646 N.E.2d 150, 152-54 (Mass. App. Ct. 1995); *Aubre v. United States*, 40 Fed. Cl. 371, 376 (1998) (an agency may reconsider its own decision only "within a short period after the making of the decision . . . and before an appeal has been taken" (citation omitted)).

Moreover, the Department may not reopen these proceedings while the very substantive questions raised by Verizon's motion are near resolution before the reviewing court. An administrative agency may not undercut judicial review proceedings that are already well underway by unilaterally reopening the agency proceedings that are under review. *See Exxon Corp. v. Train*, 554 F.2d 1310, 1316 (5th Cir. 1977) (agency lacks authority to deprive a court of jurisdiction after review proceedings were properly instituted); *accord Zenith Elec. Corp. v. United States*, 699 F. Supp. 296, 298 (C.I.T. 1988) ("[o]nce the final determination becomes the subject of the action in court . . . allowing the [agency] to take independent steps to alter the determination is in conflict with the authority of the Court"), *aff'd* 884 F.2d 556 (Fed. Cir. 1989). Similarly, once a reviewing court has undertaken review of a final agency order, the agency that rendered the order generally may not interfere with the reviewing court's jurisdiction by modifying or reconsidering the order under review. *See generally Inland Steel Co. v. United States*,

306 U.S. 153, 160 (1939). In addition, established principles strongly militate against concurrent review of the same issues by agencies and courts. *See, e.g., BellSouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994).

Applied here, the foregoing rules foreclose the Department from reopening these dockets to modify its prior orders in the manner that Verizon requests. Verizon asks the Department to usurp the district court's authority to decide a matter that has been under the court's jurisdiction for over two years, at the very point that a decision is imminent.[4] Verizon maintains that by reopening the dockets at issue to "tak[e] comments on whether the language contained in the [WorldCom and GNAPs] agreements provides for reciprocal compensation for Internet-bound traffic," the Department will be able to "address" the magistrate judge's "concern" that the Department has not already interpreted the actual language of those agreements. (Vz. Mot. at 1.) But contrary to Verizon's claim, the magistrate judge expressed no "uncertainty" whether the Department had conducted the contract analysis required by federal law. (*Id.* at 3.) Rather, the magistrate judge unequivocally recommended a finding that the Department had failed to conduct the required analysis and that the district court declare that the Department's orders violate federal law as a consequence. If the Department or Verizon believes the magistrate judge to be incorrect, the proper remedy is to file objections with the district judge—as both the Department and Verizon have done.

The case law Verizon cites does not support its motion. Verizon relies on *American Farm Lines v. Black Ball Freight Serv. et al.*, 397 U.S. 532, 541 (1970), and *United States v. Benmar*

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[4]In a telephone conference on July 31, 2002, the District Court ordered that all briefing be completed by noon on August 7, 2002, and indicated that there likely will be no oral argument.

Trans. and Leasing Corp., 444 U.S. 4, 5 (1979), to support its claim that the Department may reopen its dockets even though the district court is currently reviewing the Department's prior orders. (*See* Vz. Mot. at 4.) In *American Farm Lines*, the Supreme Court of the United States upheld the Interstate Commerce Commission's ("ICC") authority to reopen proceedings "*before* any judicial review of the merits had commenced." *Id.* at 542 (emphasis added). In that case, certain parties to a multi-party proceeding had filed petitions for judicial review while petitions for reconsideration were already pending before the ICC. The Supreme Court held that the filing of the petitions for judicial review did not deprive the ICC of jurisdiction to "complete the administrative process" by ruling on the pending reconsideration petitions where the reviewing court was not yet "ready to hear arguments on the merits." *Id*. at 541-42. In *Benmar*, the Supreme Court upheld the ICC's authority to modify its order "almost six months before oral argument in the Court of Appeals," where "all parties concurred in the [ICC's] decision to reopen the proceedings and to hold judicial review in abeyance pending the [ICC's] final disposition" of one party's petition for administrative review. 444 U.S. at 4, 5.

Neither *American Farm Lines* nor *Benmar* stands for the proposition that the Department may reopen its proceedings long after a court has begun to address the merits of an appeal and where no petitions for rehearing are pending before the agency at the time that judicial review commences. Likewise, neither case stands for the proposition that an agency may act to contradict or thwart the findings and recommendations of a magistrate judge. In fact, both cases indicate that such actions would be improper. *See American Farm Lines*, 397 U.S. at 541 (stating that an agency may not modify its prior decisions if doing so would cause any "collision or interference with the District Court."); *Benmar*, 444 U.S. at 7 &

n.1 (stating that if the ICC's actions interfered "in any manner with the proceedings in the Court of Appeals," then "we would have a different case").

Finally, even if the Department could permissibly reopen these proceedings as Verizon requests—which it cannot as set forth herein—it should not. As a matter of comity, the Department ought to await the court's ruling. The parties have staked out their positions before the court, which has had the matter under its jurisdiction for two years, is carefully reviewing matter, and is near issuing a final decision. All interests are best served by respecting the court's jurisdiction, awaiting the court's ruling, and then determining with the benefit of the court's views whether any further action at the Department is appropriate. Accordingly, the Department should deny Verizon's motion and should await the district court's resolution.

II. The Department May Not Employ the Truncated Procedures Verizon Suggests.

Verizon's request that the Department limit further proceedings to minimal procedures consisting of taking comments on the parties' interpretation of the agreements' terms violates due process and other established tenets of federal and state law.[5] Recognizing from the magistrate judge's recommendations that the Department's orders may be in trouble on appeal, Verizon seeks a quick fix. But as Verizon itself successfully argued to the United States District Court for Rhode Island, before a state utility commission interprets a carrier's obligations under an interconnection agreement, it must conduct a hearing on the meaning of the contract that satisfies the requirements of due process. *New England Tel.*

[5] As it has argued to the district court, WorldCom continues to maintain that no further analysis is necessary and that the Department already performed the requisite contract analysis in its October 1998 Order.

v. Conversent Communications, No. 99-603-L, slip. op. at 31-34 (D.R.I. Nov. 14, 2001) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). A state commission may not construe an interconnection agreement's terms, "perhaps erroneously depriving [a carrier] of a substantial property interest in that contract," without giving the carrier a "meaningful opportunity to be heard." *Id.* at 32; *see also Doherty v. Retirement Bd. of Medford*, 680 N.E.2d 45, 50 (Mass. 1997) (ruling that agencies that exercise adjudicatory powers are "constrained by the demands of due process").

Indeed, the Department itself recently told the federal court that any further proceedings at the Department in these matters would require all of the procedures normally attending the Department's adjudicatory proceedings. In its recently filed objections to the magistrate judge's recommendations, the Department argued that if it is required to interpret the relevant agreements on remand, it will "act upon a blank slate" and consider all questions *de novo*. (Ex. C, Massachusetts DTE's Objection to Entry of Recommended Decision with Respect to Parties' Cross-Motions for Summary Judgment, *Global NAPs, Inc. v. Verizon New England*, No. 00-CV-10407 et al. (D. Mass.) (filed July 18, 2002), at 14.) Accordingly, the Department has already implicitly rejected Verizon's request that it act without affording the parties a meaningful opportunity to be heard. Verizon itself effectively conceded this point in its objections to the magistrate judge's findings and recommendations. (*See* Ex. D, Objections by Verizon Massachusetts to Magistrate's Findings and Recommendations on Motions for Summary Judgment, *Global NAPs, Inc. v. Verizon New England*, No. 00-CV-10407 et al. (D. Mass.) (filed July 18, 2002), at 20 (stating that further review of the contract language should be conducted "in accord with standard principles of administrative review").)

Moreover, Massachusetts law provides that "[i]n conducting adjudicatory proceedings, . . . agencies shall afford all parties an opportunity for full and fair hearing." Mass. Stat. 30A § 10. Massachusetts agencies conducting adjudicatory proceedings may dispense with hearings and decide matters summarily only "when the papers or pleadings filed conclusively show on their face that the hearing can serve no useful purpose, because a hearing could not affect the decision." *Massachusetts Outdoor Adver. Council v. Outdoor Adver. Bd.*, 405 N.E.2d 151, 156-57 (Mass. App. Ct. 1980). Massachusetts law also guarantees a party's right to present evidence on the meaning of disputed contract terms. *See, e.g., Sax v. Sax*, 762 N.E.2d 888, 893 (Mass. App. Ct. 2002); *Hubert v. Melrose-Wakefield Hosp. Ass'n*, 661 N.E.2d 1347, 1351 (Mass. App. Ct. 1996).[6] In short, under no circumstances may the Department employ the minimal procedures that Verizon requests.

CONCLUSION

For the foregoing reasons, Verizon's motion should be denied.

Respectfully submitted,

WorldCom, Inc.,

By:_____

[6]Types of admissible evidence include evidence identifying an established business usage of terms applied in the contract, and evidence of actions performed by a party after entering into the contract that shows his understanding of the contract's legal effect. *See Keating v. Stadium Management Corp.*, 508 N.E.2d 121, 123 (Mass. App. Ct. 1987); *Bourgeois v. Hurley*, 392 N.E.2d 1061, 1064 (Mass. App. Ct. 1979).

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